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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 822.

ROBERT G. ERRINGTON, PETITIONER,

VS.

MISSOURI EX REL. WILLIAM A. COLLET,
PROSECUTING ATTORNEY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

ROBT. M. MURRAY,
5601 High Drive,
Kansas City 15, Missouri,
Attorney for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. .....

STATE OF MISSOURI EX REL. WILLIAM A. COLLET, PROSECUTING ATTORNEY IN AND FOR JACKSON COUNTY, MISSOURI,
APPELLANT,

VS.

ROBERT G. ERRINGTON, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner prays that a writ of Certiorari issue to the Supreme Court of the State of Missouri to review a judgment entered in this case on the 13th day of October, 1958.

OPINIONS BELOW.

This case has not yet been published in the bound volumes of the Missouri Supreme Court Reports, or of the Southwestern Reporter.

We are appending the opinion of the Supreme Court of Missouri.

This case was heard in Division No. 2 of the Supreme Court of Missouri on the 7th day of May, 1958. A petition for a rehearing, or to transfer the case to the Court *en banc* was filed and overruled by Division 2 of the Court. The opinion of the Court is appended.

The time for filing a petition for Writ of Certiorari was extended by the Supreme Court of Missouri on December 8, 1958, for 90 days from November 10, 1958. A further extension was granted by this Court on February 9, 1959, to and including April 8, 1959.

JURISDICTION.

The jurisdiction of this Court is invoked under the provision of Title 28, U.S.C.A., Sections 1254-1257. To review judgment of the Supreme Court of Missouri, dated October 13, 1958, and entered the same day.

Order of Supreme Court of Missouri, dated December 8, 1958, extending time for filing petition for Writ of Certiorari for 90 days, from November 10, 1958.

Order of Supreme Court of United States, dated February 9, 1957, extending time for filing petition for Writ of Certiorari to and including April 8, 1959.

QUESTIONS PRESENTED.

1. Can the Supreme Court of Missouri by construction, deprive petitioner of his constitutional right to practice his profession as a naturopathic physician, by broadening the scope of the Medical Practice Act (Chapter 334, R.S. 1949 Mo.) and declaring the Legislature intended to give the Act such meaning without specifically so providing in the Statutes?

2. Can the Supreme Court of Missouri deprive petitioner of his Constitutional rights by enjoining him from practicing a profession which was permitted by the common law and which is not expressly prohibited by statute?

3. Can the Supreme Court of Missouri in a suit to enjoin him from doing certain acts alleged to be in violation by the Medical Practice Act deprive petitioner of his constitutional rights by enjoining him from doing acts which are not prohibited by said Act?

4. Can the Legislature or the Supreme Court of Missouri by its decision require all persons who practice any branch of the healing arts to submit themselves to a Board of Medical Doctors and pass the examinations and tests required by them and to have the skill, education and training necessary to obtain a license to practice medicine and surgery?

5. Can the Supreme Court of Missouri deprive petitioner of his constitutional right to follow his profession as a Naturopathic Physician by declaring he is practicing medicine in violation of the Medical Practice Act, when the word "medicine" is not defined by said Act.

Plaintiff Appealed.

The judgment of the trial court was reversed by the Supreme Court of Missouri with direction to enter judgment as prayed in plaintiff's petition. Reversed and remanded. Defendant filed a motion for rehearing, or to transfer the case to the Court *en banc*, raising constitutional questions and said motion was overruled.

CONSTITUTIONAL QUESTIONS INVOLVED.

Violation of 14th Amendment to the Constitution of the United States:

> Section 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> * * *

STATEMENT OF THE CASE.

This action was brought by the State of Missouri *ex rel.* Wm. A. Collet, Prosecuting Attorney of Jackson County, Missouri, against Robert G. Errington to enjoin him from practicing medicine in Jackson County, Missouri, without a license, in violation of the Medical Practice Act (Chapter 334, R.S.Mo. 1949).

The defendant by his attorney filed answer to the petition (R. 13) in which defendant pleaded the petition prayed for relief and judgment against plaintiff, which if granted,

would deprive defendant of his constitutional rights under the Constitution of United States and the Constitution of Missouri (R. 19).

Thereafter, said attorney withdrew as attorney for defendant (R. 20).

Thereafter, defendant, appearing in person and without being represented by attorney because of lack of finances, filed his answer (R. 21) in which he alleged the temporary injunction previously issued by the trial court and any judgment which the Court might enter in the case by way of enforcement of the Medical Practice Act, by interpretation or construction, and which would prevent his following his profession as a Naturopathic Physician, would be in contravention of the rights guaranteed him by the Constitution of the State of Missouri and of the United States (R. 24).

The trial court found in favor of defendant and plaintiff appealed to the Supreme Court of Missouri, which Court reversed and remanded the case with directions to the trial Court to enter judgment in favor of plaintiff in accordance with the prayer of plaintiff's petition (R. 112).

Defendant filed in the Supreme Court his motion for a rehearing, or in the alternative to transfer the case to the Court *en banc*, in which motion defendant pleaded that the order and judgment of the Supreme Court of Missouri, deprived him of his constitutional rights guaranteed him by the 14th Amendment to the Constitution of the United States (App. 12).

The Supreme Court of Missouri overruled defendant's motion for rehearing, or to transfer to the Court *en banc* on the 10th day of November, 1958 (App. 20).

The Supreme Court of Missouri on the 8th day of December, 1958, granted defendant additional time to file a Petition for Writ of Certiorari in the Supreme Court of the United States, for ninety days from the 10th day of November, 1958.

The respondent, plaintiff below, brought a suit in equity to enjoin the petitioner, defendant below, from practicing medicine in Missouri without a license, in violation of the Medical Practice Act, Sections 334.010-334.030, Mo. R.S. 1949.

The petition alleged that petitioner, defendant below, had never been a licensed physician in Missouri; that he had never submitted himself to the State Board of Examiners as to his moral and educational fitness to practice medicine; that he is unskilled and uninformed in the practice of medicine and does not possess the moral and professional qualifications required by law so to do; that for compensation attempts to treat the sick and others affected with bodily infirmities; that he represents himself to the general public so as to indicate that he is authorized and does practice medicine by maintaining an office to meet patients; advertising in the telephone directory that he is a doctor and operates and conducts an establishment for the treatment of the sickness, diseases and infirmities of the human body; that he advertises by way of professional cards with his name preceded by the letters "Dr." and followed by the words, "Fellow, Nat. Medical Society"; that by reason of the foregoing, the petitioner is and has become a continuing public nuisance, detrimental to the public welfare and dangerous to the public health, contrary and against the public policy of the State; that Plaintiff has no adequate remedy at law and if Petitioner is not restrained the public will suffer irreparable damage and injury.

Defendant's answer on which the case was tried conceded that he is engaged in a branch of the healing arts known as "Naturopathy", that such science and practice seeks to ascertain and discover the causes of human ailment and diseases.

In a previous answer which was abandoned, but submitted in evidence by Plaintiff, defendant admitted that he advertised in the telephone directory that he is a doctor, by inserting his name therein preceded by the letters "Dr" and therein advertised that he operates and conducts an establishment for the treatment of the sickness, diseases and infirmities of the human body, but alleged that he is a Naturopathic Doctor and holds a degree as such and said advertisement contains the further designation of "N.D." meaning "Naturopathic Doctor" and that said advertisement contains nothing to indicate or from which it can be inferred that he claims to be a medical doctor; that he advertises by way of professional cards distributed to the public, showing his name preceded by the letters "Dr" and followed by the words "Fellow, Nat. Med. Society", and has a certificate from said Society showing him to be a Fellow in said Society, but denies that said cards contain anything indicating that defendant is authorized to or does practice medicine; that he does diagnose for his patients, the sickness, diseases and infirmities of the human body and does prescribe treatment, cure for and relief of the same, but denies that he diagnoses, treats or prescribes for such persons by the use of drugs or other means or methods used by medical doctors, physicians and surgeons; that he diagnoses, treats and prescribes for his patients as a Naturopathic Doctor and uses only the methods used by Naturopathic Doctors such as foods, diets, air, light and other of nature's remedies; that he is not now and had never been a registered physician in Missouri; that he does not now

and never has possessed a license from the State Board of Medical Examiners of Missouri to practice medicine; that he has never submitted himself to the State Board of Medical Examiners of Missouri; to demonstrate to said Board his moral, educational and professional fitness and ability to practice medicine, or to submit himself to the tests of an examination for such purpose, that he is unskilled and uninformed in the practice of medicine and does not possess the qualifications required by law so to do; but denies that he is and has become a continuous, or any, public nuisance; and denies that Plaintiff has no adequate remedy at law; and denies that the practice in which he is engaged as a Naturopathic Doctor will result in irreparable or other injury to the health of the public, or will be destructive of the general welfare and public policy of the State.

Plaintiff's evidence consisted of introducing the abandoned answer of defendant and three witnesses employed by the State to entrap Defendant and one to testify as to the records of the Board of Medical Examiners. The evidence is in substance, as follows:

Plaintiff's Evidence.

The first answer excerpts heretofore set out (R. 13).

Defendant gave his address as 1316 East 63rd St. in Kansas City, Missouri, but refused to answer questions relative to his business or profession on the ground that such answers might tend to incriminate him (R. 35-43); that his telephone number as shown in the telephone directory is correct, as well as the name Robert G. Errington; that he caused the advertisement to be inserted in the directory and had a similar ad in the directory for each year and for 1952 etc. (R. 43, 44, 45).

Mr. B. Horowitz, a witness, testified he lived in Kansas City; that in the early summer of 1953—the 29th day of May—he went to see the defendant and complained about his ankle and the agony; that defendant looked at it and said "I know what your trouble is—you have got liver trouble" (R. 51); that I would have to take some shots, certain pills and it would take all night and called his wife in and explained how it was to be followed; that certain treatments at the office and then a nurse would go home with me that night and give me certain treatments and I was to return on the following day (R. 52); that a discussion was had and certain charges were mentioned and defendant wrote Exhibit 10 (R. 53) which is a list of expenses of treatment, as follows:

Gall bladder drainage $50.00, 18 treatments at $65.00; change in intestinal flora $234.00; that he did not take any of the treatments (R. 54); that defendant stated he had been treating Mr. Hite of Harrisonville, Missouri, and that Mr. Hite had spent approximately $3,000.00 with him during the year prior to my visit (R. 55); that the same treatment recommended for me had been given Mr. Hite and that the conditions were the same—the witness testified he, Mr. Horowitz, was suffering from Psoriosis and defendant said he had been treating Mr. Hite for the same condition (R. 56); that defendant gave him a card identified as Exhibit 11 (R. 56).

On cross-examination by defendant who represented himself and was not represented by counsel, the witness Horowitz testified that he is a real estate man and consulted defendant and at no time paid him any money (R. 57).

John E. Shanahan, a witness, testified, I live in Independence, Mo. (R. 58); I am a tax agent for Missouri

Department of Revenue; I met defendant in 1953 at his office on 63rd Street; I went there to consult with him professionally and talked with him (R. 59); I complained of hystomine headaches when I went there; defendant attempted to examine me; he told me he thought my headaches were caused by a nervous condition and then mentioned about flushing of the liver; he pressed on my second and third finger of my right hand and then put pressure on my left hand and said that would relieve some of the nervous condition (R. 60); no charge was made on that first visit; I got those capsules on the first visit; my first visit was May 25, 1953. He gave me those pills on my first visit (identified as Exhibit 6) and said I would be able to rest (R. 61). He made no charge for the first visit; he gave me the pills but did not give me any prescription; I went back again and he couldn't see me; I returned again; I did not take any of the pills he gave me; on my next visit he told me about the flushing of the liver and that he could give me some temporary relief but it would not be permanent until this was done; that I would be pretty weak but his wife would be with me all night at my home and administer these shots or whatever he had to do; that he would have to give oxygen and some of those shots for it would be such a shock to your system you would have to have the shots in order to build you back up (R. 63); he said the charge for the liver would be about $50.00 and for the oxygen I wouldn't know what —one was $80.00 and coming to a total of two hundred and some dollars; that defendant gave him Exhibit 12, which is a memorandum made by defendant (R. 64), it shows $50.00 was for flushing of the liver, $80.00 could have been for the oxygen and $87.20 for the shots (R. 61). Plaintiff's Exhibit 3 was given to me by defendant and he said it was to relieve the tension on any nerves and to give me

rest so I would be able to sleep; he gave them to me but gave me no prescription; I didn't take any of the capsules; I do not know what the contents are (R. 66); I went back again and he gave me a steam bath and said he thought it would give me some temporary relief; he put me on a relaxing machine and before putting me in the bath he gave me the green pills and a pink capsule and I took them; he said the green ones were to clean me out and the pink one was an alkalizer; I then got into the bath for about thirty minutes; he said the pink one would make me sleep (R. 68); a charge of $5.00 was made for that visit; he gave me some of those green pills to take home—they are Exhibit 8; he told me to take all of those and a glass of water (R. 69); I made four trips and three were paid for at $5.00 and one was not charged for; the only time I took any oxygen was while I was in the bath (R. 70).

On cross-examination, the witness testified: I was employed by the State and went out to see if the defendant was practicing medicine; I was not injured by the treatment (R. 71).

Ann Brim, a witness, testified: She lived in Kansas City, Missouri (in the summer of 1953). I met the defendant at his office on 63rd Street (R. 72); I went there with the complaint of being nervous, tired and rundown; the defendant asked me questions from a pink sheet; he then felt of my throat and then examined my ankles and lower limbs for swelling; he called his wife in and said she was also a doctor and told her my complaints and said "I think you have a hyperthyroid condition" (R. 73); I have been a bookkeeper and have done laboratory work in doctor's offices; with one medical doctor twelve years; I do not know of ever having hyperthyroid condition. The

defendant gave me Exhibit 4 which is the form he used in examining me; it has questions on it and he asked me most of them (R. 74); he recommended medication and steam baths; I did not take any medication or steam baths on the first visit; Plaintiff's Exhibit 5 is what he wrote—$5.00 for each steam bath—18 treatments $65.00 and vitamins and calcium and treatments for three months $82.50 (R. 76); the charges were to be cash; he asked me to come back and I went back and had a treatment and paid him $5.00; I returned and had the second treatment and paid $5.00; I never had any medicine from him and his wife gave me the treatments; he gave me Exhibit 3, a card when I first went there (R. 78). On cross-examination the witness testified: The defendant did not treat me personally—he just diagnosed my condition and did not charge for the diagnosis; I was not injured by the treatment—it was very relaxing (R. 79).

John A. Hailey, a witness, testified. I live in Jefferson City; I am Executive Secretary of Missouri State Board of Medical Examiners; I keep the records and they are under my charge—those in regard to medical doctors (R. 80); I have searched the records and the defendant has never been granted a license; the defendant has never made an application for a license (R. 81); the defendant has never taken an examination and there is no record of his being licensed to practice medicine and surgery in this state (R. 82).

On cross-examination the witness testified: The Board of Examiners do not examine any others, chiropractors, osteopaths or unlicensed cults (R. 82).

The Court found in favor of defendant and held the Plaintiff was not entitled to the relief prayed (R. 81).

ARGUMENT.

I.

This case is one of many instituted in various States as a part of a plan conceived and instigated by the medical doctors associations to prevent anyone from practicing any branch of the healing arts except their own system of drugs and surgery, thereby creating a monopoly for themselves of all the business of treating the sick and infirmities. It is a continuation of the fight against osteopaths and chiropractors carried on for years and which still continues, even after the Legislature of Missouri enacted statutes expressly authorizing the licensing and practice of such branches of the healing arts.

In the case at bar, the action is brought by the Board of Medical Examiners, presumably, as alleged in the petition, to prevent petitioner from doing and performing acts which are prohibited by the Missouri Statutes known as the "Medical Practice Act" (Chapter 334, Mo. R. S. 1949), but in fact, to prevent his doing any act of treating the sick, by any and all means. In order to accomplish that objective, the Plaintiff does not confine the allegations to the one charge of violating the Act by practicing medicine without a license, but alleges facts derogatory to petitioner's character and charges him with being a "continuous public nuisance".

The evidence in the case wholly failed to substantiate such a charge, and the trial judge so held as shown by his opinion filed in the case (R. 85). After summarizing the evidence in the case, the trial judge stated his reasons for finding in favor of defendant, petitioner here, and we

adopt such reasoning and here set out that portion of the opinion; * * *

"John A. Hailey, of the State Board of Medical Examiners, testified that he examined the records of the Board and that he could find no record of any license issued to the defendant or any application for one. On cross-examination, he testified that the Medical Board of Examiners did not examine any others, that is, chiropractors, osteopaths, in this state, that they do not examine unlicensed cults, and, further, that:

Q. (By the Defendant) 'Are there any provisions in the statutory law which require the State Medical Board to examine any other professions other than those for which the statutory law is made?'

A. (By Mr. Hailey) 'I think the question answers itself, because there couldn't be anything in the statutory law that it would give the Board a privilege to examine anybody, if they didn't have a statutory law to do that.'

While the defendant was on the witness stand, he identified his place of business as being located at 1316 East Sixty-third Street, and that the name of it was 'Conservatory of Health, Dr. Robert G. Errington, Naturopathic Physician,' and that it was listed in the telephone directory in that manner.

There is no evidence introduced or sought to be introduced as to the defendant's character or reputation.

The word 'naturopathy' is defined by Webster's New International Dictionary, Second Edition, as 'A system of treatment of disease emphasizing assistance to nature, sometimes including the use of certain medicinal substances and certain physical means.' It is not mentioned in Missouri Statutes covering the licensing and control of M. D.'s, osteopaths, chiropractors, etc., and, to the writer's knowledge, is not pro-

hibited in the State of Missouri, by statute or otherwise. In fact, it is very doubtful if the Legislature has the power, let alone the desire, to prohibit it. See *State v. Biggs*, 46 S.E. 401, wherein the Supreme Court of North Carolina had before it a defendant who was charged with the violation of the statute there for practicing without a license from the Board of Medical Examiners, and, among other things, said (l.c. 403):

> 'Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be described by the M. D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment: but whether it was proper treatment or not is a matter of fact, to be settled by a jury of

his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the Legislature.'

Again, the Court stated (l.c. 404):

"* * * The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D., or prohibiting the use of such remedies altogether, neither of which results the Legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited. * * *"

This case contains an interesting discussion of the whole subject and ends with this language (l.c. 405):

"* * * All the law so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Dr. Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this state has said that out of 24 serious cases of disease, 3 could not be cured by the best remedies, 3 others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, he said, "Forbid them not."

'Upon the special verdict, the defendant should be adjudged not guilty. Reversed.'

The record in the case utterly fails to show that defendant practiced on the sick with knife or drugs. There have been many cases in the reports where it was sought to obtain monopolies in the practice and dispensing of medicine for the M. D.'s. It is a matter of common knowledge that they have fought the chiropractors, the osteopaths, the Christian Scientists, the naturopaths, and every cult who ever claimed that they could help or cure the sick. Such was done in the State of Illinois, as shown by the reports in the case of *People* v. *Love*, 131 N.E. 809, and *People ex rel. Shepardson et al.* v. *Universal Chiropractors' Ass'n et al.*, 134 N.E. 4.

Plaintiff does not seek to prosecute the defendant in this case for violation of the criminal statute, which provides penalty for such violation, but seeks to with one swipe of its M. D. broom to enjoin the defendant of curing or relieving ailments by natural means, on the theory that solely because the Statute is violated, defendant is guilty of a public nuisance. This cannot be done. See *Missouri Veterinary Medical Ass'n* v. *Glison*, 230 S.W.2d 169, wherein it was held that the unlicensed practice of veterinary surgery, dentistry and medicine is not a public nuisance which can be enjoined, notwithstanding that such practice is an offense under R. S. Mo. 1949, Secs. 340.030, 340.140 (formerly R. S. Mo. 1939, Secs. 14234, 14230).

In the case at bar, the Plaintiff failed to show that defendant was unskilled in the performance of the practice in which he was engaged or that those administered to by him were improperly treated and the evidence boiled down to one showing, and that is that defendant operates without a license. Therefore, the injunction is denied.'

Petitioner's contention is that:

(a) The practice of Naturopathy was permitted by Common Law.

(b) The State of Missouri adopted the Common Law by Statute.

(c) The Legislature of Missouri has never enacted a law prohibiting the practice of Naturopathy and until it does, the Supreme Court of Missouri cannot usurp the powers of the Legislature and legislate by judicial opinion so as to prohibit the practice of Naturopathy.

(d) In the case at bar the Supreme Court of Missouri has ordered petitioner permanently enjoined from practicing Naturopathy as such and as a basis for such ruling, states in its opinion (Appendix 8) that the Legislature, in enacting the Medical Practice Act (Chap. 334, Mo. R. S. 1949) it intended to include all persons who treat the sick, whether those who practice neither medicine nor surgery. The exact language of the opinion, is as follows:

"It is stated in State v. Smith, 233 Mo. 242, 135 S.W. 465, 468 (4), 470: 'In the main, the cases regard diagnosis as the test to determine whether a practice or treatment is included in the terms "medicine" and "surgery." This is a practical test. * * * When the practitioner makes such examination of the patient as he regards as sufficient to indicate to him the cause of the trouble, and to indicate its proper treatment, he has diagnosed the case.' And, after reviewing the development of the law, the court held (135 S.W. l.c. 468 (3)) that the words 'or to treat the sick or afflicted,' made obvious the legislative intent 'to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery.' See State ex rel. Collet v. Scopel, Mo., S.W.2d (not yet officially reported). It has been stated that 'naturopathy is simply one of the methods of practicing medicine.' Hahn v. State, Wyo., 322 P.2d 896, 900 (7)."

It must be conceded that laws are enacted by the Legislature which has that exclusive power and not by the Judiciary by judicial decision. It therefore follows that the intent attributed to the Legislature in the enactment of the Medical Practice Act cannot be grafted onto the Act by a decision of the Supreme Court of Missouri, by merely stating in its opinion that the Legislature intended to include those who practice neither medicine nor surgery, any more than it can make "Naturopathic" one of the methods of practicing medicine, by merely stating in its opinion that it is (App. 7).

The statutes enacted by the Missouri Legislature clearly refute such rulings by the Supreme Court of Missouri and show that such was not the intention of the Legislature and therefore the basis for that Court's rulings is destroyed. Therefore, such opinions should not be permitted to stand and deprive persons, including petitioner, of their constitutional rights.

In support of this statement, attention is directed to the wording of the Medical Practice Act itself, Sec. 334.010 (R.S.Mo. 1949), which provides:

> "334.010. Practitioner shall be registered physician.—It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of mid-wifery in the state of Missouri, except as herein provided." (9981).

It is apparent that the Legislature, by such language meant just what it said, that only those who practiced medicine were to be governed by the Act. The entire Act deals with persons who "practice medicine" and the same

Legislature in enacting Section 564.290 (R.S. Mo. 1949) expressly distinguished the practice of medicine and surgery from other branches of the healing arts and not governed by the Medical Practice Act, by providing that:

> "The use of the terms 'Doctor' or 'Dr.' without designation of the type of practice prohibited. No person now or hereafter licensed in this State to practice medicine, surgery, dentistry, optometry, osteopathy, chiropractic, chiropody, or veterinary, and no persons specifically permitted by law to practice the curing, healing or remedying of ailments, defects or diseases of the body or mind with or without a license, shall use the prefix 'Doctor' or 'Dr.' in connection with his name, in any letter, business card, advertisement, prescription blank, or display of any nature whatsoever, without affixing thereto suitable words or letters clearly designating the degree held by such person, or the particular type of practice in which such person is engaged, which designation shall represent the profession such person is authorized to practice by license or privilege under the laws of this State."

When the above statute was enacted, there were no statutes in Missouri providing for licensing osteopaths and chiropractors to practice in Missouri, and it is obvious that the Legislature in enacting the Medical Practice Act only intended that those practicing medicine and surgery were to be governed by its provisions and that the practice of osteopathy, chiropractic and the others mentioned were not "methods of practicing medicine".

But to further illustrate the intent of the Legislature in enacting the Medical Practice Act, attention is called to the Act of the Legislature later enacted, expressly authorizing the practice of Chiropractic and the licensing of practitioners of that profession, and which, after defining the term "Chiropractor", expressly states that the practice of Chiropractic is not the practice of medicine.

"Sec: 331.010 (R.S.Mo. 1949). Defining Practice of Chiropractic—The practice of Chiropractic is hereby defined to be the science and art of palpating and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalities and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescription of any drug or medicine. The practice of Chiropractic is hereby declared not to be the practice of medicine and surgery or osteopathy within the meaning of Chapters 334 or 337, R.S.Mo. 1949, and not subject to the provision of said chapters". Chapter 334 is entitled Practitioner of Medicine, Surgery and Mid-wifery.

If the judgment in the case at bar is permitted to stand, it must necessarily be assumed that the Supreme Court of Missouri can by its decisions declare that the Legislature intended that the provisions of the Medical Practice Act were to govern all persons who engage in the treatment and curing of ailments of the human body, whether practicing medicine or surgery, or not, when the Act itself did not define the term "medicine", and that such declaration of the Court becomes a part of the statute until the Legislature enacts other statutes expressly showing it had no such intent. The same principle of law applies to the declaration by the Supreme Court that Naturopathy is merely one method of practicing medicine.

In Section 337.010 (R.S.Mo. 1949) the Legislature made the same distinction between the science of osteopathy and medicine and stated osteopathy was not the practice of medicine. That statute reads, as follows:

"Osteopathy not the practice of medicine. The system, method, or science of treating diseases of the human body, commonly known as osteopathy, as and taught and prescribed by the American School of Os-

teopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery, within the meaning of Chapter 334 (R.S.Mo. 1949) and not subject to the provisions of said chapter."

It is a matter of common knowledge that both Osteopathy and Chiropractic were practiced by many in Missouri long before the Legislature saw fit to enact statutes defining those sciences and providing for licensing such practitioner and the Legislature will sooner or later get around to enacting similar laws licensing Naturopaths, but the fact that the Legislature did enact such laws did not mean that the practice of osteopathy and chiropractic prior thereto was unlawful, any more than the failure of the Legislature to enact laws requiring the licensing of Naturopaths can make the practice thereof unlawful.

If the Legislature intended, or the Supreme Court held, that the Medical Practice Act embraced everyone treating the sick or ailing and that everyone had to possess the education, training and skill so as to obtain a license to practice medicine, there would be no necessity for distinguishing the sciences of Osteopathy, Chiropractic, etc., from medicine and enacting statutes defining each of said sciences and requiring licenses as Osteopaths, etc., rather than medical doctors.

The conclusion is unescapable that the decision of the Supreme Court of Missouri in the case at bar is erroneous, unlawful and arbitrary and deprives petitioner of his constitutional right to practice his profession.

II.

The opinion of the Supreme Court of Missouri in the present case is an arbitrary use of power and is discriminatory. By such abuse of power, the Court has deprived

petitioner of his Constitutional rights under the 14th Amendment.

The following authorities clearly support such statement:

The Supreme Court of the United States, in *Algeyer* v. *Louisiana*, 165 U.S. 578, says:

> "The right to follow any of the common occupations is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights and that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizens."

The Court further says:

> "Liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

The Supreme Court of the United States, in *Butchers Union Company* v. *Crescent City Company*, 111 U.S. 746, said:

> "If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling and giving to others the exclusive rights of pursuing it, it certainly deprives him (to a certain extent) of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers which, as already intimated, is a material part of the liberty of the citizens."

The Supreme Court of the United States, in *Leeper* v. *Texas*, 139 U.S. 463, says:

> "By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, except that no state shall deprive particular persons or class of persons of equal and impartial justice under the law; that law, in its regular course of administration through courts of justice is due process of law and when secured by the law of the state, the constitutional requirement is satisfied; and that due process of law is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestricted by the established principles of private right and distributive justice."

The Supreme Court of the United States further says, in *Caldwell* v. *Texas*, 137 U.S. 692:

> "No state can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the provisions of the Fourteenth Amendment of the Constitution and that due process of law within the meaning of the Constitution is secured when the law operates on all alike and no one is subjected to partial or arbitrary exercise of the powers of government."

Petitioner states if the Court's interpretation of the Statute Law 1901, p. 207, is correct then a naturopath must be a licensed Physician, but a licensed Physician does not need to be a Naturopath. If that is the intention of the law, will anyone seriously claim that that is a reasonable regulation or classification? It would seem to be self-evident that it is arbitrary, unreasonable, does not operate uniformly upon the two branches of the healing art and amounts to class legislation. To place the burden upon a naturopathic physician of being a graduate in medicine pursuant to Law 1901, p. 207, is to in effect prohibit by judicial fiat the practice of naturopathy.

The laws of this state do not require one who desires to practice osteopathy to also be licensed to practice medicine, neither does it require that chiropractors be licensed in medicine. Both systems of healing, last referred to are wholly separate and distinct from the practice of medicine. In no other recognized branch of the healing art is it required that the practitioner shall be licensed in medicine. It follows that naturopathy, which is a part of the well known science of healing, international in scope, is discriminated against in an illegal manner.

The Law pursuant the maxim *noscitur a sociis* (46 C.J., p. 496) is thus stated by the Supreme Court of N.C., August term, 1903, 729, *State* v. *Biggs* (filed Dec. 18, 1903). Physicians and Surgeons—Licenses—The Code, Secs. 3122, 3124—Acts 1903, Ch. 697—Constitution of North Carolina, Art. 1, Sec. 7, 31—Const. U.S., Fourteenth Amendment, S.V. Call, 121 N.C. 646.

> "If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the Legislature was prohibited by the Constitution from enacting it, nor could the Legislature restrict the cure of the body to the practice of 'medicine and surgery,' or establish any State system of healing." State v. McKnight, 131 N.C. 723.

The Court further states, citing:

> "Chief Justice Pearson in McAden v. Jenkins, 64 N.C. 801, noted, as of common knowledge and reiterated in *Railroad* v. *Jenkins*, 68 N.C. 505. 'Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "practice of medicine and surgery" shall be construed to mean the management "for fee or reward" of any case of disease, physical or mental, real or imaginary, with or without

DRUGS, surgical operation, surgical or mechanical appliances, or BY ANY OTHER METHOD WHATSOEVER.' That is, the practice of surgery and medicine shall mean practice without surgery or medicine if a fee is charged. If no fee is charged, then the words 'surgery and medicine' drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward; yet unless the act confers, and is intended solely to confer protection upon the public, it is invalid. The Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another."

The Court further states:

"The act is too sweeping. Besides, the Legislature could no more enact that the 'practice of medicine and surgery' shall mean 'practice without medicine and surgery' than it could provide that 'two and two make five,' because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and that is forbidden by the Constitution."

The Court further states:

"The law is thus stated in *Lawton* v. *Steele*, 152 U.S., pp. 137, 138: 'The Legislature may not under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts.' After citing cases, it is said, on page 138: 'In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a

practical inhibition of certain occupations harmless in themselves and which might be carried on without detriment to the public interests.'" See also *State* v. *Pendergass*, 106 N.C. 667; *Ohio* v. *Gardner*, 58 Ohio St. 599, 41 L.R.A. 689.

3. *People* v. *Love*, 292 Ill. 304, 131 N.E. 809. The rule of reasonableness of regulation in the application to the Naturopathic physician or to any other practitioner of a limited system of healing does not, and cannot require petitioners to possess the same qualifications as persons permitted to practice medicine and surgery in all its branches.

2. *People* v. *Love*, *supra*, the Supreme Court of Illinois struck down an act of the legislature requiring that a chiropractor, in order to be licensed, should be a graduate of a four-year medical course. The court stated that it was unjust and unreasonable, and an interference with the constitutional rights of the defendant, and held that the chiropractor could only be required to have qualifications recognized by competent bodies in his own particular field of limited healing.

11. *Adams* v. *Tanner*, 244 U.S., p. 594, 61 L. Ed. 1342, L.R.A. 1917 Fed. 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 191D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper.

7. *State* v. *McKnight*, 131 N.C. 723. The State legislature cannot restrict the care of the body to the orthodox practice of "medicine and surgery" or establish any "State System of Healing" or give special and exclusive privileges to a special organized body, thereby creating a monopoly.

In the case of *Jerry R. England et al.* v. *The Louisiana State Board of Medical Examiners*, 259 Fed. Rep. 2d 626,

the Circuit Court of Appeals for the 5th Circuit, September 9, 1958, a case involving a Chiropractor, the Court said, in part:

> "State is not bound to recognize every peculiar theory or school of medicine, but it cannot deny to any individual the right to exercise a reasonable choice in method of treatment of his ills, nor can it deny correlative right of practitioner to engage in practice of useful profession—U.S.C.A. Const., Amendment 14.
> * * *
>
> "* * * In action for declaratory and injunctive relief, brought by Chiropractors claiming the State's requirements that they possess, as pre-requisite to practicing their profession, (1) diplomas from colleges approved by American Medical Association and (2) knowledge of surgery and materia medica, bore no reasonable relation to practice of Chiropractic, it was error for Federal District Court to dismiss complaint for lack of substantial Federal question warranting exercise of jurisdiction. U.S.C.A.—Court Amend. 14."

In conclusion, we respectfully state that petitioner has been deprived of his constitutional right to pursue his profession by the unlawful act of a State Supreme Court, the highest Court and in that State and that this Court should, in the interest of petitioner and the hundreds of Naturopathic Physicians in Missouri similarly affected by such decision, exercise its jurisdiction and issue its Writ of Certiorari to the Supreme Court of Missouri, so that the questions involved in this and many others being brought in various States may be fully briefed and argued and definitely settled.

Respectfully submitted,

ROBT. M MURRAY,
5601 High Drive,
Kansas City 15, Missouri,
Attorney for Petitioner.

CAUSE ARGUED AND SUBMITTED.

May 7, 1958. Before:

Division No. 2 of Supreme Court of Missouri.

"Comes now the Appellant by Attorney and after argument submits the above entitled cause to the Court. The Respondent comes not but makes default, whereupon it is ordered by the Court that this cause be and the same is hereby taken as submitted by the said Respondent."

JUDGMENT OF SUPREME COURT.

"Oct. 13, 1958. Now at this day come again the parties aforesaid by their respective attorneys and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid inform aforesaid by the said Circuit Court of Jackosn County rendered, be reversed, amended, and for naught held and esteemed and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of Jackson County for further proceedings to be had therein in conformity with the opinion of this Court herein delivered; and that the said appellant recover against the said Respondent his costs and charges herein expended, and have execution therefor (Opinion filed).

OPINION OF SUPREME COURT.

(Filed October 13, 1958.)

IN THE

SUPREME COURT OF MISSOURI

DIVISION NUMBER TWO.

SEPTEMBER SESSION, 1958.

STATE OF MISSOURI ex rel. WILLIAM A. COLLET, Prosecuting Attorney in and for Jackson County,

Appellant,

vs.

ROBERT G. ERRINGTON,

Respondent.

No. 46,211

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY.
HONORABLE JOHN F. COOK, JUDGE.

The State, at the relation of the prosecuting attorney of Jackson County (see § 56.060*), instituted this suit to enjoin the unlicensed practice of medicine by Robert G. Errington, defendant, on the ground that such practice "has become a continuing public nuisance detrimental to the public welfare and dangerous to the public health, contrary to and against the public policy of the State." The decree dismissed plaintiff's petition, and the State appealed. The

*Statutory references are to R.S.Mo. 1949, V.A.M.S., unless otherwise indicated.

State is a party and we have appellate jurisdiction. Mo. Const. Art. V, § 3; *State ex rel. Collet* v. *Scopel*, Mo., ... S.W.2d ..... (handed down September 8, 1958).

Defendant's attorney filed an answer on behalf of defendant on December 10, 1953, but withdrew from the case on April 20, 1954. Thereafter defendant appeared *pro se*.

The State read in evidence the following portions of defendant's answer of December 10, 1953, to the charges in plaintiff's petition as admissions against interest.

"Defendant admits that he advertised in the December, 1952, issue of the Greater Kansas City telephone directory that he is a Doctor, by inserting his name therein preceded by the letters 'Dr.', and therein advertises that he operates and conducts an establishment for the treatment of the sickness, diseases and infirmities of the human body, but defendant alleges that he is a Naturopathic Doctor and holds a degree as such and said advertisement contains the further designation of 'N. D.' meaning 'Naturopathic Doctor' and that said advertisement contains nothing to indicate or from which it can be inferred that he claims to be a medical doctor; and

"Defendant admits that he advertises by way of professional cards distributed to the public showing his name preceded by the letters 'Dr.' and followed by the words 'Fellow, National Medical Society' and defendant alleges that he is a member of the National Medical Society and has a certificate from said Society showing him to be a 'Fellow' in said Society, but defendant denies that said cards contain any data or statements that defendant is authorized to and does practice medicine; and

"Defendant admits that he pretends to and does diagnose for the people of Kansas City, Missouri, the sickness,

diseases and infirmities of the human body and pretends to and does prescribe a treatment, cure for and relief of the same but denies that he diagnoses, treats, or prescribes for such persons by the use of drugs or other means or methods used by medical doctors, physicians and surgeons. Defendant alleges that he diagnoses, treats and prescribes for his patients as a Naturopathic Doctor and uses only the methods used by Naturopathic Doctors, such as foods, diets, air, light and other of nature's remedies.

"Defendant admits that he is not now and has never been a registered physician in Missouri and admits he does not now and never has possessed a license from the State Board of Medical Examiners of Missouri to practice medicine.

"Defendant admits that he has never submitted himself to the State Board of Medical Examiners of Missouri to demonstrate to said Board his moral, educational and professional fitness and ability to practice medicine, or to submit himself to the tests of an examination for such purposes and admits that he is unskilled and uninformed in the practice of medicine and does not possess the qualifications required by law so to do; and denies that he is and has become a continuing, or any, public nuisance, and denies that plaintiff has no adequate remedy at law and denies that the practice in which he is engaged as a naturopathic doctor will result in irreparable or other injury to the health of the public or will be destructive of the general welfare and public policy of the State."

Defendant stated at the trial that he did not claim the above quoted admissions were not true.

William B. Horowitz was suffering from psoriasis, a chronic skin disease, and consulted defendant May 29, 1953. He displayed the condition on his leg to defendant. De-

fendant stated he knew what witness' trouble was and diagnosed it as liver trouble. He outlined a course of treatment consisting of shots, pills and treatments. Some treatments were to be administered at defendant's place of business, followed by treatment at night by defendant's nurse at witness' home. Defendant wrote down his charges for treating witness: "Gall bladder drainage, $50.00; 18 treatments at $65.00; Change in intestinal flora, $234.00." Defendant informed witness he had treated a Mr. Hite, of Harrisonville, Missouri, for a similar condition for about a year, and that Mr. Hite had paid him approximately $3,000.00 therefor.

John E. Shanahan suffered from histamine headaches. He consulted defendant on May 25, 1953. Defendant examined him and stated the headaches were caused by a nervous condition and spoke of flushing witness' liver. On witness' second visit they discussed the flushing of the liver and the charges. Defendant told witness relief would not be permanent without the flushing; that the treatments would shock one's system and leave one in a weakened condition; that defendant's wife would stay at witness' home on the night of a treatment to administer shots or whatever was necessary, and mentioned something about giving oxygen and shots to build one back up. Defendant listed his charges at $50.00 for flushing the liver; $80.00 for the oxygen, and $87.20 for the shots. Defendant gave witness some capsules to relieve the tension and permit witness to rest and sleep. Witness made four visits to defendant's office; was given capsules and pills, steam baths, treatments on mechanical devices, and, on one occasion, oxygen. Witness paid defendant $5.00 each on three of his visits.

Ann Brim called at defendant's office in the Summer of 1953, her complaint being that she was nervous, tired and

run-down. Defendant made an examination and diagnosed her complaints as "a hyperthyroid condition." He recommended as a treatment some medication and steam baths. They discussed the treatment and the charges. Defendant asked witness $65.00 for 18 treatments, and for vitamins and calcium and treatments for three months $82.50. She had two treatments, given by defendant's wife, paying $5.00 for each.

Defendant, called to the stand by plaintiff, refused to answer many of the questions propounded, claiming his privilege against incrimination. However, he testified he was and had been living at 1316 East 63rd Street, Kansas City, Missouri, for approximately eight years prior to September 15, 1955, the date of trial.

Defendant's professional card read: "Phone JA 9201. Conservatory of Health, 1316-18 East 63rd Street, Kansas City 10, Mo. Your perpetual business asset is • • • Your Health. Your most envious social asset is • • • Your Health. Prime essential for an active life is • • • Your Health. Guard It. Dr. Robert G. Errington, Fellow, Nat. Medical Society."

Defendant's advertisement in the classified section of the Greater Kansas City telephone directory under "naturopaths" read: "Conservatory of Health. Dr. Robert G. Errington, Naturopathic Physician. 1316 E. 63, JAckson 9201."

This was the extent of the material evidence.

Defendant's position, as we read this record, is that he is a naturopathic physician or doctor: that the practice of naturopathy was lawful at common law and is lawful under Chapter 334, our Medical Practice Act; that regulating the practice of naturopathy contravenes the 14th

Amendment to the Constitution of the United States by depriving defendant of the inalienable right to follow a common occupation, and that plaintiff is not entitled to injunctive relief against defendant.

The title of our Medical Practice Act reads: "An Act to regulate the practice of medicine, surgery and midwifery, and to prohibit treating the sick and afflicted without a license, and to provide penalties for the violation thereof." Laws 1901, p. 207.

It is unlawful under said Act for any person not "a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure or attempt to treat the sick and others afflicted with bodily or mental infirmities in the State of Missouri, except as herein provided." § 334.010. Naturopathy or its practice is not made an exception to the provisions of said Act. See *State ex rel. Collet* v. *Scopel*, Mo., S.W.2d ; § 334.150; Chapters 330, 331, 332, 335, 336, 337, 338.

Said Act further provides: "Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor". § 334.030.

"All persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted, as provided

in section 334.010" are required to meet certain standards and procure from the State Board of Medical Examiners a license to practice medicine and surgery in this State (§ 334.040, as amended Laws 1951, p. 727), and to secure registration certificates, and their periodic renewal, from the State Board of Medical Examiners (§§ 334.070, 334.080).

It is stated in *State* v. *Smith*, 233 Mo. 242, 135 S.W. 465, 468 (4), 470: "In the main, the cases regard diagnosis as the test to determine whether a practice or treatment is included in the terms 'medicine' and 'surgery.' This is a practical test. * * * When the practitioner makes such examination of the patient as he regards as sufficient to indicate to him the cause of the trouble, and to indicate its proper treatment, he has diagnosed the case." And, after reviewing the development of the law, the court held (135 S.W. l.c. 468(3)) that the words "or to treat the sick or afflicted," made obvious the legislative intent "to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery." See *State ex rel. Collet* v. *Scopel*, Mo., S.W.2d . It has been stated that "naturopathy is simply one of the methods of practicing medicine." *Hahn* v. *State*, Wyo., 322 P.2d 896, 900[7].

The case of *State* v. *Davis*, 194 Mo. 485, 92 S.W. 484, 489, was a prosecution under Laws 1901, p. 207. The court overruled defendant's contention that the Act was unconstitutional and void in that it deprived him of a vested right to practice medicine in this State. Defendant had moved to Illinois after practicing medicine in Missouri for a number of years and would return to Missouri periodically and meet, prescribe for, and treat patients consulting him. The court said: "This law does not undertake to deprive any person of a vested right, for there can be no such thing as a

vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice of medicine or surgery, nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose." See also *State* v. *Smith*, *supra*, 135 S.W. l.c. 470(6); *State* v. *Evertz*, Mo., 190 S.W. 287; *State ex rel. Collet* v. *Scopel*, Mo., S.W.2d ; *Hitchcock* v. *Collenberg*, D.C.Md., 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718; *Dantzler* v. *Callison*, 230 S.C. 75, 94 S.E.2d 177, appeal dismissed 352 U.S. 939, 77 S. Ct. 263, 1 L. Ed. 2d 235. Medical practice acts are upheld as valid exercises of the police power for the protection of the public health and safety.

The evidence in the instant case established that defendant advertised that he was a doctor and physician; that defendant maintained a place of business in Missouri where, for a consideration, he consulted with patients, made examinations, diagnosed their condition, prescribed and treated them for the sicknesses, diseases, and infirmities of their bodies. Clearly, what defendant was doing was within the prohibitions of our Medical Practice Act.

Is the State entitled to injunctive relief? The evidence in the instant case established, in addition to what is stated in the preceding paragraph, that defendant never possessed a license from the State Board of Medical Examiners to practice medicine and never had been a registered physician in the State of Missouri; that defendant is unskilled and uninformed in the practice of medicine and does not possess the qualifications required by law to practice medicine in Missouri; and that he had engaged in business as a naturopathic physician or doctor and professed to treat the sick and afflicted and practiced medicine within the provisions of our Medical Practice Act from day to day in Kan-

sas City, Missouri, in 1953 and the last of 1952, if not prior thereto. The facts bring the instant case within *State ex rel. Collet* v. *Scopel*, Mo., S.W.2d , wherein the judgment of the trial court was reversed and the cause remanded with directions to enjoin defendant from practicing naturopathy on the ground such practice by said defendant constituted a public nuisance. "'A public or common nuisance is an offense against the public order and economy of the state by unlawfully doing any act or by omitting to perform any duty which the common good, public decency, or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons, even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals.'" *State ex rel. Crow* v. *Canty*, 207 Mo. 439, 449, 105 S.W. 1078, 1080, quoted in the *Scopel* case, *supra*. The case presents an issue involving the public health and safety. *State* v. *Smith*, 233 Mo. 242, 268, 135 S.W. 465, 472, approving *Ex parte Lucas*, 160 Mo. 218, 232, 61 S.W. 218, 222, considered that our Medical Practice Act was enacted not alone to punish those violating its provisions but also for the protection of the public and credulous sick persons from those not qualifying under the law to practice medicine or treat the sick and afflicted. The instant record establishes a continuous and habitual violation of our Medical Practice Act and the declared public policy of the State by one not qualified to practice medicine in Missouri; and we conclude that defendant's acts constitute a public nuisance. See the ruling in the Scopel case on this issue.

The decree of the trial court is reversed and the cause is remanded with directions to find the issues for the plaintiff and permanently enjoin defendant in accordance with the prayer of plaintiff's petition.

Walter H. Bohling,
Commissioner.

Per Curiam: The foregoing opinion by Bohling, C., is adopted as the opinion of the court.

All concur.
Barrett, C. Concurs.
Stockard, C. Concurs.

PETITION FOR REHEARING.

(Filed October 28, 1958.)

"Comes now the Respondent in his own behalf, and files a motion for rehearing in the above entitled cause, or in the alternative, to transfer said cause to the Court *en banc*, with a statement of service.

Respondent's Motion for Rehearing, or in the Alternative to transfer case to the Court *en banc*, is in words and figures following, to-wit:

IN THE

SUPREME COURT OF MISSOURI

DIVISION NUMBER TWO

SEPTEMBER SESSION, 1958

STATE OF MISSOURI ex rel. WILLIAM A. COLLET, Prosecuting Attorney in and for Jackson County, Appellant, vs. ROBERT G. ERRINGTON, Respondent.	No. 46,211

Respondent's Motion for Rehearing or in the Alternative, to Transfer Case to the Court En Banc.

Now comes Respondent and respectfully moves the Court to grant to him a rehearing of this cause, or in the alternative, to transfer this case to the Court *En Banc*, for the following reasons:

-1- Because the decision of this Court is contrary to the laws of Missouri and the United States and deprives Respondent of his legal rights guaranteed him by the Constitution of the United States, and of the State of Missouri in particular, the 14th Amendment thereto and deprives Respondent of his liberties and property without due process of law and the protection of law.

-2- Because the ruling and decision of this Court is erroneous in holding that Respondent's occupation is subject to and controlled by the Laws of Missouri 1901, p. 207, Chapters 330, 331, 332, 335, 336, 337 and 338, Par. 334, 150 of Law.

-3- Because the decision of this Court is contrary to the decisions of Division No. 1 of this Court involving the same questions of law.

In support of the above, Respondent respectfully states, if as the court holds the right to practice Naturopathy—(pursuant the Philosophy, Science, Art and practice of Naturopathy, I.E., that "occupation" which is more specifically classified and recorded in Dict. of Occupational Titles—Vol. 1; Definition of Titles;—2nd Ed., March, 1949, p. 402 "DOCTOR, NATUROPATHIC" and on page 887 "NATUROPATH: NATUROPATHIST: NATUROTHERAPIST")—cannot be taken by the legislature then it follows it cannot be taken away by the judicial opinion, and cites the following authorities:

The Supreme Court of the United States, in *Algeyer v. Louisiana*, 165 U.S. 578, says:

> "The right to follow any of the common occupations is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created

equal, that they are endowed by their Creator with certain inalienable rights and that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizens."

The Court further says:

"Liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

The Supreme Court of the United States, in *Butchers Union Company* v. *Crescent City Company*, 111 U.S. 746, said:

"If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling and giving to others the exclusive rights of pursuing it, it certainly deprives him (to a certain extent) of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers which, as already intimated, is a material part of the liberty of the citizens."

The Supreme Court of the United States, in *Leeper* v. *Texas*, 139 U.S. 463, says:

"By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, except that no state shall deprive particular persons or class of persons of equal and impartial justice under the law; that law, in its regular course of administration through courts of justice is due process of law and when secured by the law of the state, the constitutional requirement is satisfied; and that due process of law is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestricted by the established principles of private right and distributive justice."

The Supreme Court of the United States further says, in *Caldwell* v. *Texas*, 137 U.S. 692:

> "No state can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the provisions of the Fourteenth Amendment of the Constitution and that due process of law within the meaning of the Constitution is secured when the law operates on all alike and no one is subjected to partial or arbitrary exercise of the powers of government."

Respondent states if the Court's interpretation of the Statute Law 1901, p. 207, is correct then a naturopath must be a licensed Physician, but a licensed Physician does not need to be a Naturopath. If that is the intention of the law, will anyone seriously claim that that is a reasonable regulation or classification? It would seem to be self-evident that it is arbitrary, unreasonable, does not operate uniformly upon the two branches of the healing art and amounts to class legislation. To place the burden upon a naturopathic physician of being a graduate in medicine pursuant Law 1901, p. 207, is to in effect prohibit by judicial fiat the practice of naturopathy.

The laws of this state do not require one who desires to practice osteopathy to also be licensed to practice medicine, neither does it require that chiropractors be licensed in medicine. Both systems of healing, last referred to are wholly separate and distinct from the practice of medicine. In no other recognized branch of the healing art is it required that the practitioner shall be licensed in medicine. It follows that naturopathy, which is a part of the well known science of healing, international in scope, is discriminated against in an illegal manner.

The law pursuant the maxim noscitur a sociis (46 C.J., p. 496) is thus stated by the Supreme Court of N.C.,

August term 1903, 729; *State* v. *Biggs* (filed Dec. 18, 1903). Physicians and Surgeons—Licenses—The Code, Secs. 3122, 3124—Acts 1903, Ch. 697—Constitution of North Carolina, Art. 1, Sec. 7, 31—Const. U.S., Fourteenth Amendment. S.V. Call, 121 N.C. 646.

> "If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the Legislature was prohibited by the Constitution from enacting it, nor could the Legislature restrict the cure of the body to the practice of 'medicine and surgery,' or establish any State system of healing." State v. McKnight, 131 N.C. 723.

The Court further states, citing:

> "Chief Justice Pearson in McAden v. Jenkins, 64 N.C. 801, noted, as of common knowledge and reiterated in Railroad v. Jenkins, 68 N.C. 505. 'Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "practice of medicine and surgery" shall be construed to mean the management "for fee or reward" of any case of disease, physical or mental, real or imaginary, with or without DRUGS, surgical operation, surgical or mechanical appliances, or BY ANY OTHER METHOD WHATSOEVER.' That is, the practice of surgery and medicine shall mean practice without surgery or medicine if a fee is charged. If no fee is charged, then the words 'surgery and medicine' drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward; Yet unless the act confers, and is intended solely to confer protection upon the public, it is invalid. The Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another."

The Court further states:

> "The act is too sweeping. Besides, the Legislature could no more enact that the 'practice of Medicine and surgery' shall mean 'practice without medicine and surgery' than it could provide that 'two and two make five,' because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and that is forbidden by the Constitution."

The Court further states:

> "The law is thus stated in Lawton v. Steele, 152 U.S., pp. 137, 138: 'The Legislature may not under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts.' After citing cases, it is said, on page 138: 'In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a practical inhibition of certain occupations harmless in themselves and which might be carried on without detriment to the public interests.'" See also State v. Pendergrass, 106 N.C. 667: Ohio v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689.

Further Respondent respectfully draws the attention of this honorable Court to the August body of Law Makers, the 71st Congress U.S.A. 3d Session, H. R. 12169; An Act, to amend the meaning and intention of an Act of Congress entitled "An Act to regulate the practice of the healing art to protect the public health of the District of Columbia". approved February 27, 1929, page 2, lines 3 to 17:

"line

object and intent of this Act is to require that the aforesaid Act of Congress, approved February 27, 1929, shall be construed to mean that *'naturopathy' as a branch of the healing art is placed upon the same basis as medicine, osteopathy, and chiropractic*, that the said Act of Congress means, and shall be construed to mean, that *the term 'naturopathy,' as used therein, is self-definitive to the same extent as are the terms 'medicine', osteopathy' and 'chiropratic,'* that no applicant for license to practice naturopathy under the said Act of Congress is required, in making application for such license, to give the character and limits of the method of healing practiced by him or her as a naturopath; nor shall the Commission on Licensure make, give or establish any definition of the character and limits of the method of healing to be practiced by naturopaths."

The above facts are stated and upheld in the case of Roy Millsap, Respondent, v. Harry E. Alderson et al., etc., Appellant. Civ. No. 3951. Second Appellate District, Division One—August 25, 1923. Herein the Court states:

> CURTIS, J.—This is an appeal from a judgment annulling on certiorari an order of the Board of Medical Examiners revoking respondent's certificate to practice naturopathy in the State of California.

The Court further states:

> Having ascertained the meaning of the terms "physician and surgeon," let us turn our attention to the words "naturopathy" and "naturopath." Not only are these terms not defined in the statutes of 1907 and 1909, as we have before observed, but we fail to find that the legislature has ever attempted to define either of these terms. Not only so, but if our information is correct neither of these words is to be found in any medical work or dictionary. Nevertheless, we believe that the record in this proceeding furnished a satisfactory method of ascertaining a correct definition of these terms. As we have before seen, the amendment to the Medical Practice Act of 1907, enacted in 1909 (Stats. 1909, p. 418), provided that "Any person who holds an unrevoked certificate issued by the board of

examiners of the Association of Naturopaths of California incorporated under the laws of the State of California, August eighth, 1904, * * * shall be entitled to practice naturopathy * * *." By the passage of this statute the legislature gave its official recognition to the work of the Association of Naturopaths of California.

The Court further states:

> From these definitions of a physician and surgeon and of a naturopath it must be evident that the calling or profession of one differs materially from the calling or profession of the other; that the system of healing employed by the naturopath has little in common with that employed by the physician and surgeon, and that, while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath is limited in his treatment to his particular system.
>
> For the reasons above stated judgment is reversed, with directions to the superior court to dismiss said proceeding.
>
> Conrey, P. J., and Houser, Jr., concurred.
>
> A petition by respondent to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 22, 1923, and the following opinion then rendered thereon:
>
> The Court.—The application for transfer to this court after decision by the district court of appeal of the second appellate district, division one, is denied * * *

In conclusion, Respondent respectfully submits that this Court has deprived him of his Constitutional right to practice Naturopathy, by interpreting the legislative

Act of Missouri to mean that he cannot practice Naturopathy without a license to practice medicine, which the Legislature itself has not and cannot legally do. The Court has not limited its finding to holding that under the evidence in the case Respondent was practicing medicine, which Respondent does not admit, but the opinion goes farther and holds Respondent cannot practice Naturopathy, even if he uses only Naturopathic methods. The decision of this Court therefore, amounts to usurpation of legislative powers by the judicial branch of our government and legislating against the practice of Naturopathy when, if such legislation would be proper at all, it would have to be done by the legislature.

Wherefore, Respondent prays the court to grant him a rehearing in this case, or in the alternative, transfer this case to the Court En Banc.

/s/ Robert G. Errington,
Robert G. Errington, Respondent,
100 East 63rd Street,
Kansas City, Missouri,
Phone, Ja-3-9201.

ORDER DENYING REHEARING.

(November 10, 1958.)

Now at this day the Court having seen and considered the motion of the Respondent for a rehearing in the above entitled cause, or in the alternative, to transfer this cause to the Court *en banc* doth order that said motion be and the same is hereby overruled.

ENTRY OF APPEARANCE.

(November 17, 1958.)

"Comes now Mr. Robt. M. Murray and enters his appearance for Respondent herein."

MOTION TO STAY MANDATE.

(November 17, 1958.)

"Comes the said Respondent, by attorney, and files a motion to stay the mandate in the above entitled cause with a statement of service."

ORDER STAYING MANDATE.

(December 8, 1958.)

"Now at this day the Court having seen and considered the motion of the Respondent to stay the mandate in the above entitled cause, doth order that said motion be and the same is hereby sustained and the mandate accordingly stayed for 90 days from the 10th day of November, 1958.